



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of International Paper Company to
Abandon the Ward Paper Company Dam, City and
Town of Merrill, Lincoln County, Wisconsin

Case No. 3-NO-98-1030

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

The Department of Natural Resources received an application from the International Paper Company, Two Manhattanville Road, Purchase, New York, to abandon and remove its dam on the Prairie River in Merrill. The dam is located partially in the City of Merrill and partially in the Town of Merrill at the site of the former Ward Paper Mill. The mill was closed in November, 1994, and the hydroelectric generator associated with the dam is no longer operable. International Paper has attempted to transfer ownership of the dam to a responsible party but has been unsuccessful. Consequently, the company has proposed to the Department that it abandon and remove the dam.

The Department of Natural Resources prepared a detailed Environmental Assessment addressing the various natural resource and environmental aspects of this proposal. Several objections were filed to the Department opposing the permit application.

Pursuant to due notice hearing was held on March 9, 1999 at Merrill, Wisconsin before Jeffrey D Boldt, administrative law judge (ALJ). Pursuant to sec. 31.185, Stats., the Division waited more than 120 days (July 9, 1999) prior to issuing an Order in this matter.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. International Paper Company (IP), Two Manhattanville Road, Purchase, New York, completed filing an application with the Department for a permit under sec. 31.185, Stats., to abandon and remove its dam on the Prairie River, located in the City and Town of Merrill, Lincoln County. The Department and the applicant have fulfilled all procedural requirements of secs. 31.06 and 31 185, Stats.

2. The applicant owns real property located in the SE ¼ of the SW ¼ of Section 1, Township 31 North, Range 6 East, Lincoln County. The above-described property abuts the Prairie River which is navigable in fact at the project site.

3. The applicant proposes to abandon and remove the Ward Paper Mill Dam on the Prairie River. The dam was originally constructed in 1904 to serve logging operations and generate hydroelectric power. In 1924, Grandfather Falls Company acquired ownership of the dam. In 1948 the Ward Paper Company Division of Arvey Corporation obtained ownership of the dam. The applicant, IP, acquired Arvey Corporation in December, 1987.

4. The dam is constructed of an earthen embankment and gated spillway 71 feet wide. There are five tainter gates, each 11 feet wide and nine feet high. The dam is 18 feet high, with 13 feet between the headwater and tail water. The main embankment is approximately 550 feet wide; a secondary embankment is 400 feet long. The abutments and gate piers of the dam serve as bridge supports for an existing railroad spur serving the site. The dam also includes a powerhouse containing a 40-foot wide flume and intake pipe, located under the mill building,

connecting to a 250 horsepower generator that was capable of producing approximately 186 kilowatts. The generator is currently inoperable due to a worn bearing that has been removed and the coupling between the generator and the turbine being disconnected.

5. The dam impounds a 118 acre flowage known variously as the Ward Mill Pond, or, more commonly as Prairie Lake. The impoundment stores approximately 709 acre feet of storage that supports both a cold and warmwater fishery.

6. A dam safety inspection on July 6, 1994, by the Department of Natural Resources determined the Ward Dam to be an unsafe, high hazard dam because of development downstream of the dam and due to a lack of spillway capacity needed to pass large flood flows. In April of 1996 there was a flood which resulted in significant damage to neighboring properties. It is likely that the potential floodplain area would be reduced as a result of dam removal. (Ex. 4)

7. On October 15, 1994, International Paper ceased operations at the Ward Paper Company Mill, and soon thereafter closed the mill. Attempts by IP to transfer ownership of the mill buildings, landfill, dam and railroad spur line have been unsuccessful.

8. A large group of local residents have opposed the abandonment of the Ward Paper Company Dam, indicating that its removal would have negative effects on aesthetics, property values, flood control, health concerns, wildlife, wetlands, aquatic habitat, recreation and the community as a whole.

9. There is no significant contamination in sediment samples in the impoundment tested by the State Laboratory of Hygiene at the request of the DNR. (Ex. 48, Martini) The applicant has prepared a detailed erosion control plan that describes the staged drawdown and removal of the dam. (Ex. 11) All of the expert testimony at hearing indicated that the Mead and Hunt plan employs state-of-the-art erosion control measures which should minimize sediment transport to the greatest extent practicable during drawdown and construction and removal activities. Some short-term turbidity is to be expected, particularly during in-river construction and removal. Further, there is no question that there will be some sediment transport associated with dam removal. However, to reduce sediment transport, the drawdown of the flowage would be accomplished in two stages. The first stage would be to lower the pond level to the elevation of the gate sills, about nine feet, by opening the gates on the existing dam. The DNR recommended drawdown rate of water levels in the Mill Pond would be at a rate of about two feet per day over a four to five day period. The first stage would expose more than 80% of the flowage bed and allow revegetation efforts to begin prior to removal of the dam. The second stage would occur when the gate sills are lowered by five feet and the level on the remaining pond would be brought down to the stream bed elevation. The flowage would be restored to its original riverine character. River flows would not be altered from existing natural flows except that the existing south raceway below the powerhouse would be abandoned due to filling of the intake and flume. (Ex. 4) The permit as issued requires the permit-holder to stabilize and restore downstream areas impacted by significant sediment transport. A preponderance of the credible evidence, including all expert testimony, indicates that the proposed dam removal will not adversely affect water quality nor will it increase water pollution in the Prairie River. The dam

removal and abandonment will not cause environmental pollution as defined in sec. 299.01(4), Stats., if the removal is undertaken in accordance with this permit.

10. The Prairie River is classified as a warm water sport and a Class I and II brook and brown trout fishery. (Ex. 39) The fishery has "overlap" characteristics, meaning it consists of warm water, cool water and cold water fish species, many of which migrate to find suitable seasonal habitat. (Ex. 44) DNR staff conducted an extensive review of fish passage issues in connection with consideration of the abandonment permit application. (Id.) The Department concluded that with respect to maintaining and enhancing the public interest in the high-quality fishery in the prairie river system, "the preferred alternative is dam removal." If there had been a solid commitment to reconstruct the dam, the DNR would have required construction of fish passage devices. However, the report concluded, as follows: "No fish passage device will be as effective as dam removal in restoring the full hydrological, chemical, biological and navigation functions of the Prairie River." (Id., p. 3)

The proposed dam abandonment and removal will not have a detrimental impact on maintaining the high quality fishery in the Prairie River.

11. There would be significant benefits to amphibians and reptiles from dam removal, as better habitat for these creatures would likely result from larger sections of undisturbed vegetation of particular benefit to turtles and frogs. (Ex. 52) There is no question that other dam removal projects have resulted in a return to a more natural vegetation cover which is of benefit to various wildlife species. (See: Exs. 61-62)

The project will have no significant detrimental impact on nesting bald eagles which currently make use of Ward Pond. The river supports an excellent fishery which should allow the eagles to remain and continue to nest in this area of the Prairie River. (Ex 51)

Further, there are freshwater mussel species downstream of the dam. None of the mussels identified in the area are endangered or threatened species. While there are some concerns that individual mussels may perish during dam removal, no significant detrimental impacts on mussels are likely. (Ex. 53) The applicant has agreed to make every effort to recover and save individual fish and mussels that become stranded during dam removal. Further, the permit has a specific condition requiring all reasonable efforts to save stranded fish and mussels.

Taken as a whole, a preponderance of the credible evidence leads to a conclusion that there will be no detrimental impacts to wildlife habitat as a result of dam removal.

12. Given the predominant flow of groundwater in the area, the drawdown would not be likely to de-water wells or wetlands in the area. (Martini testimony) Further, based on the report, "Wellhead Protection Plan, City of Merrill Lincoln County Wisconsin" published by the North Central Wisconsin Regional Planning Commission in July, 1996, there should be no impact to the City of Merrill water supply wells. There will also not be any impacts to other water supplies not in the vicinity of the existing mill pond. Previous experience with drawdowns of the mill pond in the 1980's have indicated the extent of the impact of the groundwater

drawdown on water supply wells. Water wells not impacted by previous drawdowns should not be impacted by the permanent reduction in the level of the Prairie River. (Ex. 50)

13. Members of the public raised concerns about an increased risk of blastomycosis, a fungal infection related to the presence of rotting tree stumps. (Ex. 56) However, a preponderance of the evidence was that there would likely be no increased risk of the infection as a result of dam removal. Dr. Jeff Moore testified that he was familiar with the etiology and treatment of the illness and that in his professional judgment there was likely no greater risk of the illness associated with dam removal. Further, the Wisconsin Division of Health does not recommend avoidance of areas associated with the drawdown of impoundments. (Exs. 4) A preponderance of the evidence, all of the expert testimony, indicates that there is already a risk of blastomycosis in the area, and that said risk will not increase as a result of dam removal.

14. The proposed abandonment will not adversely affect public rights in navigable waters and will not endanger life, health and property upon compliance with the conditions in the permit.

15. The Department of Natural Resources had made an environmental assessment of the proposed project and determined that the grant or denial of the permit requested does not constitute a major state action significantly affecting the quality of the human environment.

DISCUSSION

There is no question that many area residents love Prairie Lake passionately and will be very sorry to see it gone. The public input at this hearing demonstrated the sincerity and depth of feeling with which this view is held. However, as the ALJ and the DNR made clear at the hearing, the legal standard for dam abandonment focuses on public rights in navigable waters, and the protection of life, health and property. The applicant has demonstrated that its plans will protect the public's interest in maintaining the high-quality fishery, and will be protective of water quality by employment of erosion control practices.

Unlike the many people who urged Saving Prairie Lake, the law does not state a preference for a river or an impoundment. The DNR properly identified the dam as a hazard, given the current state of disrepair. The 1996 flooding, demonstrates the risks of leaving the dam in its present state of neglect and disrepair. The applicant has the legal right to abandon the dam, instead of repairing it, if the abandonment protect public rights and does not directly threaten public safety, and protects life, health and property.

Some area residents urged a reading of this statutory language to include the protection of property values, rather than *direct harm to property from impacts of the navigable waters*. However, this reading would not be consistent with longstanding DNR and Division interpretation of sec. 30.185, Stats., limiting property concerns to direct impacts such as flooding damage. Further, the Wisconsin Supreme court has made it clear that the public interest in navigable waters focuses on impacts to and of the water itself rather than indirect, upland socioeconomic impacts. Wisconsin Environmental Decade v. DNR, 115 Wis. 2d 381, 340

N.W.2d 722 (1983). In this regard, it should be noted that by lessening the risk of flood damage, dam abandonment is likely to result in less direct damage to property.

While the changes along this section of the Prairie River will be difficult for many to accept, the long-term interests of the river will be protected. The record at the hearing established that the legal standards would be met, and the permit must be issued.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 31.185 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue a permit for the abandonment and removal of said dam subject to the conditions specified.
2. All conditions are necessary to protect the public interest in the Prairie River, to promote safety, and to protect life, health and property within the meaning of sec. 30.185, Stats.
3. Hearing in this matter was held on March 9, 1999, and the Division deferred issuing this Order until after July 9, 1999, to allow a period of 120 days for any municipality or other person, or association an opportunity to acquire ownership of the dam pursuant to sec. 30.185(4), Stats. No such municipality, persons or other organization have made themselves known to the Division.
4. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment.

PERMIT

WHEREFORE, IT IS HEREBY ORDERED, that a permit be issued pursuant to sec. 30.185, Stats., subject to the following conditions:

1. Acceptance of this permit and beginning the project means that the permit-holder has read, understand and agree to follow all conditions of this permit.
2. The drawdown, removal and restoration must be done in accordance with the plan submitted to and approved by the Department and the conditions of this permit.
3. The permit-holder shall obtain any necessary authority needed under local zoning ordinances, from agencies of the State of Wisconsin, including the Department of Natural Resources, and from the U.S. Army Corps of Engineers.
4. This permit expires three years from the date of its issuance if the project is not completed before then. No work may begin or continue after this date unless a new permit or permit extension is granted in writing by the Department.

5. The permit-holder must allow free and unlimited access to your project site at any time to any Department employee who is investigating the project.

6 The Department may change the conditions of this permit if the project obstructs navigation or becomes detrimental to the public interest or if such changes become necessary to protect the environment.

7. The permit-holder must provide a copy of this permit to your contractor and keep a copy at the project site at all times until the project has been completed.

8. The permit-holder must notify Gary Bartz, Antigo Area Office, Box 310, Antigo, WI 54409 (715) 627-4317, in writing at least five days before starting your project and again within five days after completing the project.

9. The permit-holder must notify the owner of the dam (WI Public Service) immediately downstream from the Ward Paper Company Dam, in writing, at least five days before starting the project and again within five days after completing it.

10. Drawdown of the flowage must occur at a rate of 1 inch per hour, unless otherwise approved by the Department.

11. The permit-holder must remove the dam in a manner that will result in minimal, long-term sediment deposition downstream from the dam. The permittee shall cease or modify drawdown at the request of the Department if the Department determines that detrimental, long-term sediment deposition is occurring. The permit-holder shall make reasonable efforts acceptable to the DNR to stabilize and restore downstream areas impacted by significant sediment deposition associated with dam removal.

12. The abandonment and removal of the dam described herein should be accomplished in a manner, which will provide for the restoration of navigation.

13. The removal and abandonment should be made in such a way that flood flows are not materially obstructed and flood damage potential is reduced.

14. The permit-holder must stabilize all exposed sediment outside of the river channel in a manner specified in the erosion control plan and approved by the Department.

15. The permit-holder shall inspect the flowage during drawdown to determine if fish or aquatic life are stranded. To the extent practical, in cooperation with Department staff, living fish and mussels shall be returned to the water as soon as practicable.

16. The permit-holder must drawdown the flowage to the sill of the existing gates prior to September 1 after the first growing season after the permit issuance subject to review by the Department taking into consideration growing seasons, flow conditions, precipitation patterns, or other environmental factors relevant to protection of the public interest. The gate

structure must be maintained as a functioning water control structure until adequate vegetative stabilization is accomplished.

17. The City and Town of Merrill shall be notified prior to commencement of any drawdown, removal and restoration activities undertaken by the permit-holder.

Dated at Madison, Wisconsin on July 23, 1999.

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By: Jeffrey D. Boldt
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.